



State of New Hampshire

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

STATE EMPLOYEES ASSOCIATION
OF NEW HAMPSHIRE, S.E.I.U.
LOCAL 1984

Complainant

v.

STATE OF NEW HAMPSHIRE
(PARI-MUTUEL COMMISSION)

Respondent

CASE NO. S-0373:1

DECISION NO. 96-114

APPEARANCES

Representing State Employees Association:

Ward P. Freeman, Director of Negotiations

Representing State of New Hampshire:

Thomas F. Manning

Also appearing:

Michael Martin, Employee
Paul M. Kelley, State
Stephen M. Johnston, Employee
Kenneth E. Lee, Jr., Employee
Cynthia Jankowski, Employee

BACKGROUND

The State Employees Association of New Hampshire, SEIU Local 1984, AFL-CIO (Association) filed unfair labor practice (ULP) charges and a request for a cease and desist order against the State of New Hampshire, Pari-Mutuel Commission (State) on

October 22, 1996 alleging violations of RSA 273-A:5 I (e) and (i) resulting from a unilateral change in compensation based on the number of races worked and causing a violation of past practice. The State filed its answer on October 31, 1996 after which this matter was heard by the PELRB on November 7, 1996.

FINDINGS OF FACT

1. The State of New Hampshire is a "public employer" of personnel employed by the New Hampshire Pari-Mutuel Commission within the meaning of RSA 273-A:1 X.
2. The State Employees Association of New Hampshire, SEIU Local 1984, is the duly certified bargaining agent for certain classified employees employed by the New Hampshire Pari-Mutuel Commission and has been so since December 7, 1983.
3. The State and the Association are parties to a collective bargaining agreement (CBA) for the period July 1, 1995 through June 30, 1997. Pari-Mutuel Commission (PMC) employees are covered by Articles I through XXI thereof and by Article XL which applies to those employees in particular as a "sub-unit agreement."
4. As stipulated by the pleadings and notwithstanding the existence of the CBA and/or the sub-unit agreement, rates of pay for the aggrieved employees who are complaining in this matter are addressed by RSA 284:8 which bases compensation on the number of races programs worked. It was effective on August 16, 1977 and authorized hiring employees "...at such compensation per racing program as the commission may prescribe, subject to the regulations of the state personnel commission." Payment to PMC employees has been made pursuant to RSA 284:8 consistently during the term of the current CBA and during previous CBA's between the parties which span the last thirteen years, according to the testimony of Chief Inspector Michael Martin.
5. Paul Kelley, Deputy Director of the PMC since 1987, became Director in 1995. Upon assuming those duties, he requested an audit. Observation No. 10 in the audit report, captioned as "Compensation Paid to the PMC Employees," observed that the "PMC has over

40 full and part-time employees that work at the four racetracks in the state. RSA 284:8 requires that these employees be paid "...per racing program as the commission may prescribe, subject to the regulations of the state personnel commission.'" Due to this method of compensation, the auditors examined four job titles. (Audit Report, p. 25, Attachment No. 2 to ULP) and found that four employees had combined annual compensation of \$43,049, or 57%, more than they would have been paid on a straight hourly basis for their labor grades (no overtime was involved). The auditors recommended:

The PMC should consult with the Department of Justice and the Division of Personnel to determine whether its current practices of compensating its track employees are consistent with both statute and state personnel rules. Appropriate changes should be made to the PMC payroll procedures if it is determined that they are not consistent with statute and state personnel rules.

The PMC should request changes to statute as appropriate to make the PMC compensation practices consistent with state payroll procedures and personnel rules.

6. Consistent with the auditors' report, the PMC requested an opinion from the Office of the Attorney General in the fall of 1995. A letter opinion was issued on June 26, 1996 (Attachment No. 1 to ULP) which found "the relevant portions of RSA 284:8 are potentially ambiguous." It continued:

In view of the fact that the legislative history of RSA 284:8 provides that assistants and employees of the Pari-Mutuel Commission at the racetracks are to be paid for actual time worked and the fact that the Division of Personnel has no regulation which allows employees to be paid on a per diem basis or for more hours than are actually worked, it is our view that to the extent that the employees are being paid for more hours than are actually being worked, they are being paid incorrectly.

Additionally, you have asked whether it would be legally permissible for the Pari-Mutuel Commission to continue paying employees as they were paid in the past for the current racing season. Given the ambiguity of the statute and the fact that current employees were offered jobs at the previous pay scales, it is our view that the Commission may legally continue to pay such employees at the race-tracks as they have been paid in the past. However, during the next racing season, employees should be paid in a manner consistent with this opinion. [Emphasis added]

7. On August 30, 1996, Kelly wrote Paddock Inspector and unit steward Stephen Johnson (Attachment No. 4 to ULP) saying, in pertinent part:

In the Fall of 1995 the New Hampshire Pari-Mutuel Commission requested that the Office of the Attorney General issued an opinion as to whether this agency was properly compensating its' [sic] employees. On June 28, 1996 [sic] the Attorney General issued his opinion, and at the Commission meeting held on July 24, 1996 the Commission accepted the letter (therefore becoming a public document) and ordered me to implement changes to comply with the Attorney Generals [sic] opinion.

The Attorney General has given his opinion that New Hampshire Pari-Mutuel Commission employees should be paid hourly, as is the case with other classified State employees. Therefore effective January 1, 1997 the Commission will be paying on an hourly basis, rather than a card or program of racing.

8. The State's Office of Employee Relations examined thirty-one (31) job titles in the PMC sub-unit in a document entitled "Analysis of Pay Change Required by A. G. Opinion" (State Exhibit No. 2). Comparisons between current pay and projected pay, per the opinion, produced losses ranging from 20% to 48%, or, in dollar terms, from \$369 to \$15,402 annually. Overall impact on the 31 positions was an average wage decrease of 38% or \$202,841 spread over all positions. The recommended changes affected benefits

for three of the 31 positions.

DECISION AND ORDER

In this case, the parties have been operating under a mutually acceptable procedure for some thirteen years, since the bargaining unit was first certified. That mutually acceptable procedure included the payment of certain personnel by the race worked rather than by the hour. The State, in its answer and in opening argument, claims that what formerly had been a mutually acceptable procedure is not now an enforceable past practice. We disagree.

Payment of PMC employees under RSA 284:8 has been authorized by statute for almost twenty years. Payments thereunder have been made consistently under state employee contracts since this sub-unit, as part of the overall state unit, was certified. Those payments, besides being mutually acceptable, have been open, within the knowledge of both the parties and of long duration, i.e., over the term of several CBA's. The parties have never renegotiated the "by-the-race" method of payment during the duration of their relationship, although there have been many opportunities to do so. Such apparent satisfaction with the payment method sanctioned by RSA 284:8 and the historical adhesion to that methodology cause us to conclude that there is a bona fide, and enforceable, past practice.

The State would have us find that the circumstances of this case permit it to make a unilateral, mid-contract change in the methodology of paying the PMC employees impacted by the opinion and recommendations from the office of the Attorney General. We again disagree. Such a change, mid-term to the contract, would make the purposes of negotiating a CBA meaningless and, because it would be unilateral, would inappropriately and unjustly "shift the balance of power guaranteed by RSA 273-A" in favor of the State. See Appeal of Franklin Education Association, 136 N.H. 332 at 337 (1992) and Appeal of Milton School District, 137 N.H. 240 at 245 (1993). While Milton, *supra*, speaks to maintaining the status quo at the expiration of a CBA, we believe it is even more compelling to maintain that status quo during the term of a duly negotiated CBA.

The Office of the Attorney General found that the "by-the-race" method of compensation permitted certain PMC "employees to be paid on a per diem basis or for more hours than actually worked." The thirteen year acquiescence of the personnel commission, now the Division of Personnel, to payments pursuant

to RSA 284:8 and the Attorney General's permission to continue that method of payment for the then-current racing season support the principle that any changes to the compensation scheme must be bargained.

In Appeal of Alton School District, 140 N.H. 308 (1995), the New Hampshire Supreme Court said, "A unilateral change in a condition of employment is equivalent to a refusal to negotiate that term and destroys the level playing field necessary for productive and fair labor negotiations." The same result applies in this case. If the parties wish to deviate from the manner in which they have compensated certain PMC employees over the past thirteen years, they are obligated to bargain that change.

The State, by and through the Pari-Mutuel Commission, is directed to CEASE and DESIST from unilaterally implementing an hourly based compensation plan on January 1, 1997, to negotiate any such changes with the certified bargaining agent and to maintain the status quo in the meantime.

So ordered.

Signed this 12th day of DECEMBER, 1996.


EDWARD J. HASELTINE
Chairman

By unanimous decision. Chairman Edward J. Haseltine presiding.
Members E. Vincent Hall and William Kidder present and voting.